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No. 05-705

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITONER

Respondent has not provided any convincing reason to deny review of the questions this case presents. Respondent tries to downplay the circuit split over whether payphone owners may sue in federal court to recover extra compensation for coinless calls, but the conflict is undeniably square and consequential. Respondent also suggests that the Ninth Circuit's decision is correct, but it does not even attempt to refute Petitioner's central explanations as to why the Ninth Circuit's dual holdings are wrong. Finally, Respondent suggests that this particular case is not important enough to warrant this Court's attention, but it ignores that this case is one of many, and that – as the FCC itself has stated – its legal issues are critical to the Nation's interest uniform and effective telecommunications law.

In all events, this Court should act without delay to resolve whether lawsuits like this one may be brought in federal court.

I. This Court Should Resolve The Circuit Split Over Whether Section 201(b) Creates A Private Cause Of Action To Recover For Alleged Violations Of The FCC's Payphone Compensation Regulations.

A. The Conflict Is Genuine And Meaningful.

Respondent contends that this case does not present a serious conflict because (1) the only disagreement between the Ninth and D.C. Circuits is "over the deference required by *Chevron*" and (2) that disagreement turns on this Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005), which is not discussed in the D.C. Circuit's opinion. BIO at 4-7. Neither component of this argument withstands scrutiny.

1. The Ninth and D.C. Circuits are not divided merely over some abstract *Chevron* issue; they are squarely divided over whether § 201(b) of the Communications Act creates a private cause of action to recover for alleged violations of the FCC's payphone compensation regulations. *See* Pet. App. 13a n.5 (acknowledging this conflict). Such lawsuits are permissible in the Ninth Circuit but are prohibited in the D.C. Circuit. For purposes of this Court's *certiorari* considerations, it does not matter whether this conflict is traceable to a disagreement over an application of *Chevron* principles or over other statutory-construction considerations. (It is traceable to both.) The bottom line is that two federal circuits – as well as district courts – expressly disagree over whether a private cause of action exists to enforce a federal law. *Id.*; *see also Flying J Inc. v. Sprint Communications Co.*, ___ F. Supp. 2d ___, 2006 WL 18603, at *4-5 (D. Utah Jan. 4, 2006) (siding with Ninth Circuit); *Smartstop, Inc. v. AT&T Corp.*, 374 F. Supp. 2d 930 (D. Colo. 2005) (siding with D.C. Circuit). This kind of conflict is a classic reason for granting *certiorari*. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (addressing whether a private cause of action exists to enforce a federal statute create); *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (same); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (addressing issue whether a private cause of action exists to enforce a federal regulation).

2. The D.C. Circuit's failure to discuss *Brand X* in its opinion does not provide any valid reason for delaying review of this issue. The portion of *Brand X* that Respondent contends is relevant here (BIO at 8) is nothing more than a straightforward rendition of the familiar *Chevron* two-step process for assessing the pertinence of administrative regulations. Suffice it to say, the D.C. Circuit is perfectly aware of how *Chevron* works. It simply held in its opinion resolving this issue that the FCC had not issued any order that is "entitled to *Chevron* deference." *APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1247 (D.C. Cir.

2005); *see also id.* at 1254 (Ginsburg, J., dissenting) (arguing, to no avail, that *2003 Payphone Order* is entitled to deference).

Furthermore, even if *Brand X* were somehow relevant to the circuit split here, Respondent itself acknowledges that the D.C. Circuit had ample opportunity in the petition for rehearing or rehearing en banc to consider whether *Brand X* made any difference to its holding. BIO at 7 n.4. The D.C. Circuit declined to grant rehearing, indicating (quite rightly) that it does not.

B. The Ninth Circuit's Decision Contravenes This Court's Precedent.

Respondent argues that a private cause of action must exist to enforce the FCC's payphone compensation regulations because Petitioner acknowledges that payphone owners may bring such claims administratively in the FCC. BIO at 11-13. Sections 206 and 207 of the Act give plaintiffs the right to seek redress for certain injuries either in the FCC *or* in federal court. Thus, in Respondent's view, once it is clear it may seek to enforce the FCC's regulations in the FCC, it must also be able to do so in federal court. BIO at 7-9.

Respondent, however, overlooks the fact that payphone service providers' right to bring claims to the FCC seeking to enforce FCC regulations derives from the FCC's general powers described in 47 U.S.C. § 154(i), not from section 206 or 207. *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); Pet. at 11-12. Sections 206 and 207 are triggered only when something "in this chapter"– that is, the Act itself – has been violated. And, as Petitioner explained extensively in its Petition for Certiorari (Pet. 13-15), failing to pay

compensation for coinless payphone calls does not violate any provision *of the Act*. Respondent does not even contend otherwise. Accordingly, this Court's decision in *Sandoval* forecloses a federal court from creating a private remedy where Congress did not. *See* Pet. 13-15.

II. This Court Should Resolve Whether Section 276 Preempts Similar State Law Claims For *Quantum Meruit* And Breach Of Implied Contract.

Respondent asserts that *certiorari* is inappropriate with respect to its state-law claims because there is no express circuit conflict on the issue – that is, because the D.C. Circuit's *APCC* decision does not expressly foreclose such claims. BIO at 9-10. But Respondent never answers Petitioner's argument that state-law claims are permissible only if a private federal cause of action exists to enforce violations of the FCC's payphone compensation regulations. *See* Pet. 16-17. Thus, the Ninth Circuit's decision to allow such claims is at odds with prevailing law in the D.C. Circuit.

In any event, whatever the extent of the circuits' disagreement over the permissibility of bringing state-law claims to obtain compensation for coinless payphone calls, the issue warrants *certiorari* in its own right. For reasons Petitioner has explained – and that Respondent does not even try to refute – the Ninth Circuit's ruling creates serious logistical problems for long distance carriers and rests on a careless reading of the FCC's regulations. Pet. App. 11-12, 17-18.

III. The Issues This Case Presents Are Very Important.

Respondent's final argument for denying review is that *this particular case* is not important enough to justify review

because it involves only about $30,000. BIO at 10.[1] But Respondent does not dispute that *the questions presented* are sufficiently weighty to warrant expending this Court's resources. Indeed, several payphone service providers seeking *certiorari* in the D.C. Circuit case expressly have acknowledged that the Petition for Certiorari here "correctly identifies business and litigation uncertainty that arises from conflicting lower court decisions" in this area. Petition for Certiorari at 30, *APCC Servs., Inc. v. Sprint Communications Co.* (No. 05-766) ("*APCC* Pet. for Cert.").[2] That is because, in the aggregate, millions of dollars are at stake in the several cases like this one that are pending or waiting in the wings across the country. *See* Pet. 10-13; *see also Flying J Inc.*, ___ F. Supp. 2d at ___, 2006 WL 18603, at *4-6 (adopting Ninth Circuit's view of circuit conflict and allowing claims under § 201(b) and state-law contract-related theories to go forward). Indeed, Respondent's counsel himself recently filed another such case in California, seeking over $600,000

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[1] Respondent filed an initial complaint in late 2001. After Global Crossing declared bankruptcy, Respondent filed a new complaint in March of 2003, seeking only about $30,000. In early 2003, the district court entered an order staying the litigation in the original case, but noting that the case remained pending and that the stay "shall not prejudice the rights of any party." Order Removing Case from Active List at 1, *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.* (No. C01-1852). Respondent's description in its brief in opposition of its "complaint" refers only to its new complaint. *See* BIO at 2 n.1. In any event, as Respondent implicitly recognizes, both of its complaints seek the same kind of relief and raise both questions presented here.

[2] This case is plainly the superior vehicle for resolving the confusion in this area of telecommunication law. There is serious doubt in *APCC* whether the plaintiffs/petitioners have standing; the D.C. Circuit panel divided on the issue. *Compare APCC Servs.*, 418 F.3d at 1242-45 (majority opinion) *with id.* at 1250-53 (Sentelle, J., dissenting). Furthermore, this case, unlike *APCC*, raises the significant question whether payphone service providers may advance state-law claims to recover compensation for coinless phone calls.

in payphone compensation. *See* Complaint at 7 ¶ 26 & Exhibits A-C, *Wolfe v. Global Rock Networks, Inc.*, No. 05-8328 AHM (C.D. Cal.) (filed Nov. 23, 2005). And uniformity is vitally important in this area of telecommunications law. *See* Pet. 11-12; *APCC* Pet. for Cert. at 29-30.

Lest there be any doubt on this score, the FCC itself participated as *amicus curiae* in both the Ninth Circuit and D.C. Circuit cases, stating that the cases "raise[] important issues regarding enforcement of the Communications Act, in general, and the Act's payphone compensation regulations, in particular." Brief for FCC as Amicus Curiae in Support of Appellee at 1, *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Ins,* 423 F.3d 1056 (9th Cir. 2005) (No. 04-35287). The FCC is correct, and this Court should bring clarity and order to these matters.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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